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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re M.U., a Person Coming Under the  
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ERIC U. et al.,

Defendants and Appellants.

F073771, F073971

(Fresno Super. Ct. No. 15CEJ300041-1)

**OPINION**

**THE COURT\***

APPEALS from an order of the Superior Court of Fresno County. Mary Dolas,  
Judge.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and  
Appellant Eric U.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and  
Appellant Stephanie F.

Daniel Cederborg, County Counsel, and Brent C. Woodward, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Franson, J. and Peña, J.

## **INTRODUCTION**

Appellants Eric U. (father) and Stephanie F. (mother) appeal from the juvenile court's order terminating their parental rights pursuant to Welfare and Institutions Code section 366.26<sup>1</sup>, and denial of their section 388 petitions, contending the beneficial relationship exception should have applied to prevent termination of parental rights. We affirm.

## **FACTUAL AND PROCEDURAL SUMMARY**

Father previously appealed from the denial of reunification services. We affirmed the denial of reunification services in our unpublished opinion in case No. F071963.<sup>2</sup>

The Fresno County Department of Social Services (department) filed a juvenile dependency petition on behalf of M.U. on February 13, 2015. The petition alleged inter alia that M.U. fell within the provisions of section 300, subdivision (b), because of substance abuse by both of her parents. An amended section 300 petition was filed on February 17, 2015, which included all the allegations of the original petition and added allegations that M.U. was at risk because of domestic violence in the home.

In the detention report, the department advised it had received a referral that M.U. was living with her mother in an unsafe home. There were exposed electrical wires in reach of M.U., power strips were connected together and ran from the home to the main house, and drugs and drug paraphernalia were in the home. An open septic tank was behind the home. The bedroom was filled with methamphetamine smoke, and a cigarette box filled with marijuana and prescription pills was in reach of M.U. A protective hold was placed on M.U.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

<sup>2</sup> Many of the facts are taken from our unpublished opinion in case No. F071963.

Mother stated that she and M.U. had been living in the home for about one and one-half months. Father had been living with them until about a week prior, when he was in a confrontation with one of the roommates who also was living in the house. Father was placed on a section 5150 hold.

At the February 18, 2015 detention hearing, the juvenile court ordered M.U. detained from both parents and found Eric to be the presumed father of M.U. The juvenile court ordered that the department provide parenting, substance abuse, mental health, and domestic violence assessment and services to both mother and father. Father did not meet with the social worker after the detention hearing, as he was arrested and incarcerated.

The jurisdiction report noted there was an active restraining order between mother and father because of a history of domestic violence, however, they continued to remain in a relationship. The domestic violence included physical and verbal altercations in front of M.U. The jurisdiction report also noted that father had substance abuse issues, including the use of methamphetamine and marijuana. Father had tested positive for marijuana on February 13, 2015.

The report asked that the allegations of the amended petition be found true and M.U. be declared a dependent of the juvenile court pursuant to section 300, subdivision (b).

Father signed a waiver of rights and submitted on the jurisdiction report at the continued jurisdictional hearing on March 24, 2015. The juvenile court found that father was not contesting the evidence presented by the department. The juvenile court made true findings on all of the allegations of the amended petition. The disposition hearing was scheduled for April 21, 2015.

The disposition report recommended that reunification services be denied father pursuant to section 361.5, subdivision (b)(13). Father's probation report, dated

November 14, 2014, noted that father had been referred to an outpatient treatment program for substance abuse and had completed the program. The disposition report stated that father told the social worker on March 23, 2015, that he had a substance abuse problem with methamphetamine and marijuana. Father also told the social worker he would benefit from a substance abuse treatment program.

Father had two criminal convictions involving drugs in 2010, one for possession of a controlled substance and one for possession of paraphernalia. He was ordered into a substance abuse treatment program, but did not complete the treatment. Father was ordered into a treatment program again in 2014 by the probation department. He reported completing this program, but provided no proof of completion.

The disposition report noted that father's substance abuse was a factor in the domestic violence in the home. Father had failed to achieve and maintain sobriety over the past several years despite being ordered into substance abuse treatment programs on at least two occasions, the home where M.U. was found had drugs and drug paraphernalia within reach of M.U., and father had told social workers he could not provide a safe home for M.U.

The disposition report opined that reunification was not in the best interests of M.U. At that time, M.U. was 10 months old and had no significant bond with father. Father had untreated mental health issues, domestic violence behaviors, substance abuse issues, and was unable to fulfill the role of a stable and sober care provider for M.U.

Father was still in custody as a result of a February 2015 domestic violence conviction. Father was hoping for an early release and entry into a residential treatment program for substance abuse.

As for mother, the disposition report recommended reunification services be provided. M.U. remained in her aunt's care, however, mother was harassing the aunt via phone calls and text messages.

The contested disposition hearing commenced on June 2, 2015. The department submitted on the various reports that had been filed, as did mother. The department also reserved the right to present rebuttal witnesses and evidence. Father's counsel called the social worker to testify and questioned her about the contents of the disposition report.

At the conclusion of the contested disposition hearing on June 4, 2015, the juvenile court ordered that reunification services be provided to mother, but denied to father pursuant to section 361.5, subdivision (b)(13). Father timely appealed on July 15, 2015. We affirmed the juvenile court's denial of reunification services in our unpublished opinion in case No. F071963.

In its November 12, 2015 status review report, the department recommended terminating reunification services to mother. Mother had not participated in parenting education, did not complete substance abuse treatment, and was noncompliant with other terms of the reunification plan.

M.U. remained placed with her paternal aunt. The aunt reported that visits between M.U. and her parents did not go well. M.U. exhibited negative behavior after visits with her parents.

On December 16, 2015, the juvenile court found that mother had made minimal progress on her reunification plan and terminated reunification services as to mother. The juvenile court also reduced visitation to once per month for both mother and father.

On February 11, 2016, father filed a section 388 petition. Father asked for reunification services and for unsupervised visitation with M.U. Father also asked the juvenile court to consider placing M.U. with him. The juvenile court ordered that father's section 388 petition be set for a hearing. The department opposed father's section 388 petition.

On February 25, 2016, mother filed a section 388 petition. Mother asked for additional reunification services and increased visitation. The juvenile court denied mother's petition on March 9, 2016.

In the section 366.26 report filed by the department on May 4, 2016, the recommendation was for adoption as the permanent plan for M.U. The department asked the juvenile court to terminate the parental rights of both mother and father. The report noted that M.U. was thriving in her foster placement and the foster family were the prospective adoptive parents.

At the contested hearing on May 4, 2016, the juvenile court denied father's section 388 petition. The juvenile court then found M.U. to be adoptable, selected adoption as her permanent plan, and terminated the parental rights of both mother and father.

Father filed a timely appeal, designated as case No. F073771. Mother filed an appeal, designated as case No. F073971. By order of this court, the cases were consolidated under case No. F073771 on November 9, 2016.

### **DISCUSSION**

Mother and father contend the juvenile court erred in denying their section 388 petitions and in failing to find the beneficial relationship exception existed to prevent termination of parental rights.

#### ***I. Section 388 Petitions***

Mother and father filed separate section 388 petitions. Section 388 allows a parent, on the grounds of new evidence or change of circumstances, to petition the juvenile court to modify or change any order previously made. (§ 388, subd. (a)(1).) Appellate courts have consistently applied an abuse of discretion standard of review to a denial of a section 388 petition. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re S.R.* (2009) 173 Cal.App.4th 864, 866; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The burden of proof is on the petitioner in a section 388 petition to prove by a preponderance of the evidence that the modification requested will promote the best interests of the child. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1193-1194 (*L.S.*)). A parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

When a section 388 petition is brought, as they were in M.U.'s case, after the section 366.26 hearing is scheduled, the focus is on the child's need for permanency and stability and there is a rebuttable presumption that out-of-home care is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A parent's interest in the care, custody, and companionship of the child is not paramount and a juvenile court addressing a section 388 petition must recognize and apply the shift in focus. (*Ibid.*)

In her petition, mother asserted that after reunification services were terminated by the court, she had sought treatment and realized her need for anger management, substance abuse, parenting, and other services. Mother asked that the juvenile court reinstate reunification services and increase visitation because "it would give [mother] the opportunity to continue to prove her commitment to sobriety, and her commitment to building a safe and appropriate environment" for M.U. Mother's section 388 petition was denied without a hearing.

From February 2015, when the section 300 petition was filed, to November 2015, when the department recommended termination of services, mother had not participated in parenting education, did not complete substance abuse treatment, and was noncompliant with other terms of the reunification plan. When she filed her section 388 petition, mother was residing at a residential alcohol and drug treatment facility, had not completed the program, and was unable to provide a stable home for M.U.

Nothing in mother's section 388 petition provided prima facie evidence that mother was capable of providing a stable, safe home environment for M.U. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) Delaying permanency for M.U. to see if mother would ever be able to provide a sober, stable home was not in the best interests of M.U. and the juvenile court did not abuse its discretion in denying mother's section 388 petition. (*L.S., supra*, 230 Cal.App.4th at pp. 1193-1194.)

As for father's section 388 petition, father stated that he had completed some services and requested reunification services be provided and that he be considered for placement. The juvenile court set a hearing on father's section 388 petition, but ultimately found that there was only a minimal change of circumstances and granting the section 388 petition was not in M.U.'s best interests.

As previously noted in our opinion in case No. F071963, father's substance abuse was a factor in the domestic violence in the home; father had failed to achieve and maintain sobriety over the past several years, despite being ordered into substance abuse treatment programs on at least two occasions; the home where M.U. was found had drugs and drug paraphernalia within reach of M.U.; and father previously had told the social workers he cannot provide a safe home for M.U., all of which factored into a denial of reunification services.

Subsequent to the denial of reunification services, father visited with M.U. but she exhibited negative behavior after visits with her parents. Father had completed some programs and believed he would be able to parent M.U. if given the chance. Father had been incarcerated for a portion of M.U.'s infancy and acknowledged the dependency was filed because of "substantial drug use and ongoing domestic violence."

Father provided no evidence that allowing him to reunify with M.U. and have custody of M.U. was in the child's best interest. Father had failed to maintain sobriety multiple times, had a minimal relationship with M.U., and M.U. was thriving in the



placement that would be her permanent home if parental rights were terminated. The juvenile court did not abuse its discretion in denying father's section 388 petition on the basis that granting the petition was not in M.U.'s best interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

## ***II. Beneficial Relationship Exception***

Mother and father contend they each established the existence of the beneficial relationship exception and therefore the juvenile court erred by terminating their parental rights. We disagree.

Section 366.26 governs the proceedings at which the juvenile court must select a permanent placement for a dependent child. The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) If the court determines it is likely the child will be adopted, the statute mandates termination of parental rights unless the parent opposing termination can demonstrate that one of the statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B).) The juvenile court made a specific finding that it was likely M.U. would be adopted.

M.U.'s parents contend the exception found in section 366.26, subdivision (c)(1)(B)(i) (the beneficial relationship exception), applied in this case. The beneficial relationship exception pertains where the evidence supports "a compelling reason for determining that termination would be detrimental to the child [because] [the parent maintained] regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) " 'To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination.' [Citation.] A beneficial relationship 'is one that "promotes the well-being of the child to

such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” ’ ’ ( *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

The nature of the relationship between the parent and child is key in determining the existence of a beneficial relationship; it is not sufficient to show that the child derives some benefit from the relationship or shares some “ ‘emotional bond’ ” with the parent. ( *In re K.P.* (2012) 203 Cal.App.4th 614, 621 ( *K.P.* ).) “To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed.” ( *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) In other words, the parent must show he or she occupies a “ ‘parental role’ ” in the child’s life.’ ” ( *K.P.*, *supra*, 203 Cal.App.4th at p. 621.) Factors to consider include, “ ‘[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs.” ’ ’ ( *In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.)

The parent has the burden of proving the statutory exception applies. ( *In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) The juvenile court’s decision a parent has not satisfied this burden may be based on either or both of two component determinations—whether a beneficial parental relationship exists and whether the existence of that relationship constitutes “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. ( *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved

by the permanency of adoption, we review that determination for abuse of discretion. (*K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622.)

M.U. was born in June of 2014. She was initially placed in foster care in February 2015, when she was barely eight months old. M.U. had been out of mother's and father's custody for nearly 14 months at the time of the section 366.26 hearing in May 2016. During the time M.U. was in foster care, her parents had supervised visitation with M.U., after which M.U. exhibited negative behavior. During visits, M.U.'s parents were unable to respond to M.U.'s "cues for hunger, comfort, or encouragement."

Even if all visits went well between M.U. and her parents and the parents were affectionate with M.U., that does not compel a finding that mother and/or father had a beneficial relationship with M.U. as a matter of law. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527.) Mother and father were required to show they filled a parental role and they failed to produce evidence establishing this.

Further, there was no evidence that terminating mother's or father's parental rights would be detrimental to M.U. other than that the parents wished to maintain a connection with M.U. No bonding study or other evidence showing that termination of parental rights would have a significant detrimental effect on M.U.'s life was presented. The department's section 366.26 report noted that the "birth parents have no significant parent/child relationship with their daughter due to their inconsistent visits, mental instability, incarceration or not being clean and sober." Additionally, the social worker opined in her report that the termination of parental rights would not be detrimental to M.U. in light of the prospective benefits of security and stability that adoption would provide.

We conclude substantial evidence supported the juvenile court's conclusion that mother and father failed to establish the existence of the beneficial relationship exception.

Consequently, the beneficial relationship exception to adoption does not apply and the juvenile court did not err in terminating parental rights.

**DISPOSITION**

The order terminating the parental rights of mother and father, filed May 19, 2016, is affirmed.